

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AMALIA STYS and DEPARTMENT OF DEFENSE,
DEFENSE INVESTIGATIVE SERVICES, Lowell, Mass.

*Docket No. 96-521; Submitted on the Record;
Issued June 9, 1998*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation benefits on October 17, 1995 to reflect her wage-earning capacity as a part-time receptionist.

On March 21, 1989 appellant, then a 56-year-old secretary, sustained bilateral carpal tunnel syndrome causally related to factors of her federal employment. Appellant did not return to work. In a decision dated October 14, 1992, the Office accepted her claim for this condition and began payment of compensation for temporary total disability.

In a work restriction report dated September 2, 1993, Dr. Steven Moskowitz, appellant's treating physician and a Board-certified physiatrist, indicated that appellant could work four hours a day with restrictions on lifting, gripping and repetitive hand movements. Appellant initially participated in the nurse medical management program, however, her case was transferred to the rehabilitation program on December 29, 1993. On April 19, 1994 Rosemarie Marchi was assigned as appellant's rehabilitation counselor. In a report dated September 30, 1994, Ms. Marchi indicated that it was pointless to pursue the scant job opportunities available to appellant with her restrictions and recommended that she undergo training in voice-activated computer usage to expand her employment opportunities. On February 17, 1995 appellant's case was transferred to Joseph Goodman, another rehabilitation counselor, due the illness of Ms. Marchi. He indicated that appellant was capable of performing work as a secretary, medical secretary, admissions clerk or receptionist if a voice-activated personal computer was supplied for her use. On July 17, 1995 appellant was reemployed as a receptionist, *Dictionary of Occupational Titles* (DOT) 237-367-038, at Snelling Personnel for 20 hours a week, 4 hours a day at an hourly rate of \$8.50. However, on September 11, 1995 appellant was terminated from this position.

In a decision dated October 17, 1995, the Office advised appellant that it had determined that she had been reemployed in a part-time capacity as a receptionist effective July 17, 1995.

The Office determined that this position fairly and reasonably represented her wage-earning capacity. In the memorandum accompanying the decision, the Office noted that appellant had begun work as a part-time receptionist on July 17, 1995 and had been terminated from that position on September 11, 1995 after 56 days of employment. The Office indicated that appellant had been terminated due to her failure to perform the required work and had been offered the opportunity to complete the week when she was fired which, if she had accepted the offer, would have meant she was employed for 60 days. The Office concluded that appellant had been successfully reemployed in a part-time capacity with earnings of \$170.00 per week. The Office calculated that appellant's adjusted wage-earning capacity was \$142.22.

The Board finds that the Office improperly determined appellant's loss of wage-earning capacity based on her actual earnings after reemployment as a part-time receptionist.

Once the Office accepts a claim, it has the burden of proving that the disability ceased or lessened in order to justify termination or modification of compensation. Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries, and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.¹ Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity.² Generally wages earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.³ After the Office determines that appellant's actual earnings fairly and reasonably represent his or her wage-earning capacity, application of the principles set forth in the *Alfred C. Shadrick*⁴ decision will result in the percentage of the employee's loss of wage-earning capacity.⁵

In the present case, the Office has not established that appellant's actual earnings fairly and reasonably represented her wage-earning capacity as she was not employed for the requisite 60-day period set forth in the Federal Procedure Manual necessary for such a determination. The Federal Procedure Manual states:

"After the claimant has been working for 60 days, the [claims examiner] will determine whether the claimant's actual earnings fairly and reasonably represent his or her [wage-earning capacity.] If so, a formal decision should be issued no

¹ See generally 5 U.S.C. § 8115(a), *The Law of Workmen's Compensation* § 57.22 (1989); see also *Betty F. Wade*, 37 ECAB 556 (1986).

² 5 U.S.C. § 8115(a); *Clarence D. Ross*, 42 ECAB 556 (1991).

³ *Hubert F. Myatt*, 32 ECAB 1994 (1981).

⁴ 5 ECAB 376 (1953).

⁵ See *Hattie Drummond*, 39 ECAB 904 (1988); *Shadrick*, *supra* note 3.

later that 90 days after the date of return to work. If not, the [claims examiner] should proceed with a constructed [loss of wage-earning capacity] by asking the [rehabilitation specialist] to identify two suitable jobs and applying the factors set forth under 5 U.S.C. § 8115(a)....”⁶ (emphasis in the original)

Appellant was terminated after 56 days of employment, and, therefore, did not have 60 days of actual wages from which the Office could derive a fair and reasonable representation of her wage-earning capacity. Although the Office noted that appellant’s termination was based on poor job performance, rather than a physical or vocational inability to perform the part-time duties of a receptionist, and further found that she had been offered the opportunity to complete work during the week of September 11, 1995 which would have resulted in her completing 60 days of employment, there is conflicting evidence with respect to this determination. Mr. Goodman indicated in his September 22, 1995 rehabilitation report that Ms. Bernice Kaiser, appellant’s reemployment employer, had listed several complaints about appellant’s job performance and had advised him that appellant was to be dismissed on September 11, 1995. Mr. Goodman stated that in a conversation with appellant she indicated that she felt demeaned by Ms. Kaiser and that while she had been offered the opportunity to complete the week, she had refused it. In contrast, in her statement to the Office dated September 16, 1995, appellant indicated that she was advised by Ms. Kaiser that her employment was to be terminated because the employing establishment needed a full-time receptionist rather than a part-time receptionist. Appellant reported that Ms. Kaiser indicated that she would not need appellant to stay for the rest of the week or until the position was filled. In light of the fact that the reported conversation between appellant and Mr. Goodman differs on critical points from the statement submitted to the Office by appellant and in the absence of corroborating statements from Ms. Kaiser that appellant was dismissed due to poor job performance, the Office improperly determined that appellant had been successfully reemployed as a part-time receptionist as the evidence is in conflict. Thus, the Office improperly determined that appellant could have worked for 60 days if she had so desired and therefore did not meet its burden of proof in determining that appellant’s employment as a part-time receptionist fairly and reasonably represented her wage-earning capacity.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determination of Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993)

The decision of the Office of Workers' Compensation Programs dated October 17, 1995 is hereby reversed.

Dated, Washington, D.C.
June 9, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member